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IN THE

Supreme Court of the United States

October Term, 1966

No. 443

BENJAMIN A. SCHABERT,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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October Term, 1966

No.

BENJAMIN A. SCHABERT,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The above named petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled cause on June 14, 1966, which affirmed a judgment of the United States District Court for the Eastern District of New York convicting petitioner, upon a jury verdict, on three counts of an indictment charging him with having wilfully and knowingly received and accepted monies as a labor union officer from an employer in violation of 29 U. S. C. § 186(b).

Petitioner was sentenced on the first count to a term of imprisonment for three months and a fine of $5,000, and sentence was suspended on the second and third counts and appellant placed on probation for a period of two years (134a-135a).*

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* Figures in parentheses followed by the letter "a", unless otherwise specified, refer to the pages of petitioner's printed Appendix in the Court of Appeals. Emphasis throughout is supplied, unless otherwise specified.

Opinions Below

The opinion of the Court of Appeals is not yet reported. It is printed in Appendix B, *infra*, pp. 3a-12a. No opinion was rendered by the District Court.

Jurisdiction

The judgment of the Court of Appeals was entered on June 14, 1966 (App. B, *infra*, p. 13a). A timely petition for rehearing filed by petitioner was denied by that Court on July 20, 1966 (App. B, *infra*, pp. 14a, 15a). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented

1. Whether it is prejudicial error and violative of 18 U. S. C. § 3481 for the trial court, in charging the jury at the request of a non-testifying defendant in a Federal criminal case that no adverse inference can be drawn from his failure to testify, to make the prefatory statement that the Court "normally" did not give such instructions and gave them only because it was requested to do so.

2. Whether it is prejudicial error and violative of 28 U. S. C. § 1732 for the trial court in a Federal criminal case to admit in evidence written entries not shown to have been made substantially contemporaneously with the transactions purportedly reflected thereby, which are used by the prosecution to corroborate the disputed testimony of a key prosecution witness.

3. Whether it is prejudicial error for the trial court in a Federal criminal case to refuse to charge that evidence of defendant's good character may of itself raise a reasonable doubt as to defendant's guilt, and to charge, instead, that such evidence has to be considered with all

the other evidence in determining whether a reasonable doubt has been created.

4. Whether it is plain error in a prosecution of an employees' representative on charges of having wilfully received and accepted cash payments from an employer in violation of 29 U. S. C. § 186(b), for the trial court to submit the case to the jury without any definition of the essential element "wilfully" except for giving the jury an extreme illustration that the defendant's receipt of money would not be wilful if it occurred while he was in a drunken stupor.

5. Whether in such a prosecution, in which one of the defenses is that the employer's story of alleged cash payments to the defendant is fictitious and that the employer's cash withdrawals from his firm were instead part of an income tax fraud on his part, it is plain error for the trial court to charge the jury that the case was "not an income tax case" and that the employer's firm was "not on trial in connection with income tax".

Statutes and Rule Involved

The statutes and Rule here involved are 29 U. S. C. § 186(a), (b) and (d); 18 U. S. C. § 3481; 28 U. S. C. § 1732(a); and Fed. Rules Cr. Proc., Rule 52(b). The pertinent portions thereof are set out in Appendix A, *infra*, pp. 1a-2a.

Statement

At the times here involved, petitioner was the financial secretary and business agent of Plumbers Local Union 371, a labor organization affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (57a). Several members of this local union were among the 18 to 20 employees of Novak & Co., Inc., a plumbing firm, which

in late 1958 was awarded a contract to do the plumbing work in the construction of a New York City housing project on Staten Island, known as the Stapleton Houses (8a, 9a). One Leon Novak was the president of that firm (7a-8a), and the indictment charged petitioner with having "wilfully and knowingly received and accepted" from Leon Novak, in violation of 29 U. S. C. § 186(b), approximately $1,150 on or about April 19, 1960, as charged in the first count; $250 on or about July 19, 1960, as charged in the second count; and $300 on or about January 28, 1961, as charged in the third count (4a-5a).

Novak was the only witness to the payments alleged to have been made to petitioner, and the Government's case rested primarily on his testimony. Novak was not indicted, and had received immunity in the Eastern and Southern Districts, as well as in the County of Queens, and before the New York City Commissioner of Investigation (67a-68a).

Novak testified that shortly after the work commenced on the Stapleton project in the spring of 1959 he met with petitioner and told petitioner that he "was going to count him in for $5 an apartment", and that petitioner said, "I hope it's a good job for you. You will get the best men we got" (8a, 10a-11a). According to Novak, he met petitioner again about six or eight weeks thereafter and "believed" that he "gave him some money" in cash at that time (12a), though he was unable to state the amount of the payment (12a-15a). He further testified that on about five or six subsequent occasions, he gave petitioner additional sums in cash, the exact amounts of which he could not recall, all of which he claimed added up to the $1,150 alleged in the first count (15a, 16a). He also testified that he made additional cash payments to petitioner of $250 on July 19, 1960, as alleged in the second count, and $300 on January 28, 1961, as alleged in the third count (15a).

Novak testified that he obtained the cash for each of these alleged payments from his bookkeeper, Miss Frieda Farb, and that she put the money on each occasion into an envelope, which he gave to petitioner (17a, 18a). Miss Farb testified that the money came out of a secret cash fund for "job expenses", kept in the office safe, which was accumulated by padding the payroll checks (42a-45a). Novak would come to her and ask for a specified amount of cash, and she would take the money out of the cash fund in the safe and put it in an envelope and give it to him (47a, 87a-88a). Miss Farb, however, concededly had no personal knowledge as to whether any moneys had actually been given by Novak to petitioner (32a-34a, 87a).

Miss Farb further testified that whenever she made a withdrawal from the secret cash fund and gave the money to Novak in an envelope, she made an entry "on or about that time" in a special book which she kept for that purpose (45a, 46a), separate and apart from the regular cash disbursements journal, and which was received in evidence as Government's Exhibit 10 (46a-47a, 132a-133a).

The entries in this special book (Govt.'s Exh. 10) were in chronological order, covering the period from July 1957 to February 1961, and related to other jobs as well as to the Stapleton project (48a, 50a). That book had several columns, including one headed "Withdrawal" and another headed "Expended". The only items entered in that book, purportedly reflecting amounts "*Expended*" by payment to petitioner, consisted of an item of $250 marked "B. Schabert—Staple." under date of July 19, 1960, and another item of $300, similarly marked, under date of January 28, 1961 (Govt.'s Exh. 10, 133a). There were no other entries in the book under the column "Expended" having any reference to petitioner, though there were two entries under the column "*Withdrawal*" under date of February 9, 1960, next to the name "B. Schabert", one in the amount of $500, and the other in the amount of $50, both appearing

together with a number of other items under a general heading "*Returned to Kitty from Xmas money*", the $50 item reading "B. Schabert from 1958 Xmas" (Govt.'s Exh. 10, 133a).

Upon examining Government's Exhibit 10, Miss Farb testified that she saw only two entries therein indicating that she had withdrawn cash from the fund and given it to Novak in an envelope purportedly for petitioner—the one of $250 as of July 19, 1960, and the other of $300 as of January 28, 1961 (48a, 49a). She testified that she saw no entry relating to petitioner for the date of April 19, 1960, as alleged in the first count (48a). When she was asked whether she was able to find "any other entries in that book relating to Mr. Schabert", she answered, "I don't see any others" (49a, 50a). She was then asked the following questions by the Court and gave the following answers (51a):

> "The Court: Would it be fair to say, therefore, that if you were called upon to draw on that fund to put money in an envelope at the request of Mr. Novak, who might have mentioned a name to you, that the entries would then be in that book?
> The Witness: Yes.
> The Court: You find only two entries, one of $250 and one of $300?
> The Witness: Yes.
> The Court: You don't find another $1,100?
> The Witness: No."

The Government also introduced in evidence (54a), over objection of petitioner's counsel (31a, 34a-35a, 47a, 54a-55a), one page (p. 118) of another smaller book which Miss Farb kept (Govt.'s Exh. 1, 130a, 131a). The single page of that book which was admitted in evidence (131a) carried, at the top thereof, the legend "Staple.—693 apts. @ 5 = 3465" and the name "B. Schabert", and then contained the following entries:

"4/19/60	1150
7/19/60	250
1/28/61	300"

In contrast to her testimony with respect to the larger book which she kept (Govt.'s Exh. 10)—to the effect that she would enter in that book every withdrawal made by her from the special cash fund at Novak's request at or about the time of such withdrawal (45a)—, Miss Farb testified with respect to the smaller book (Govt.'s Exh. 1) merely that she would make entries therein when she received instructions from Novak "to do something", and that she would make the entries either at the time Novak gave her such instructions or within a day or two later, but always within a day or two of the date that appeared therein (52a, 31a, 33a).

Novak's testimony made it clear that the entries in this smaller book were not made until "some time in the latter part of 1960", at a time substantially later than the payments allegedly made by him to petitioner reflected in the total of $1,150 entered in the smaller book under date of April 19, 1960. Novak thus testified that he had kept a record himself on slips of paper of the monies he claimed he gave to petitioner, and that those slips were all compiled at one time by Miss Farb and the total thereof entered by her in this smaller book "some time in the latter part of 1960" and that the individual slips were destroyed (19a). Miss Farb, on the other hand, did not testify that she had received any such slips from Novak, or that she had made the entry of $1,150 on the basis of such slips. She in fact gave no testimony as to the circumstances under which she made the entries in the smaller book. Novak further testified that he did not see Miss Farb make any of the entries and was not present when she did so (16a).

Though Novak's nephew, Tannenbaum, had a 20% stock interest in the company and held the office of secretary and had the right to sign checks without any countersignature (66a, 67a), Novak testified that his nephew knew nothing about the cash fund kept in the safe and did not

have any record of any disbursements therefrom (79a, 68a, 69a).

Novak confirmed the truth of a statement previously given by him to the authorities "that of the various entries in these books some of these payments were actually never made" (80a). He further testified (80a):

> "There were occasions, your Honor, where I had taken an envelope from Miss Farb to give to a certain individual and not having caught up with him in a month or two, I either gave it back or expended it, or otherwise, but did not deliver it."

When Novak was asked on cross-examination whether the payments which he claimed he had made to petitioner were taken as an income tax deduction, he first answered that he was "not completely familiar with the breakdown of the income tax" and that the return was prepared by his accountant (81a). He further stated that he did not tell the accountant about these payments (81a). He then admitted that in prior statements to the authorities, he had stated that the monies withdrawn by him for the alleged cash payments were "charged as an expense of the job" (82a); and that he believed that the monies so withdrawn were "taken as a tax deduction" (83a). He was then again asked whether any payment that he claimed he had made to petitioner was "taken as a tax deduction", and his answer was that "They would be if they were listed as job expenses and extended into expenses" (83a).

Petitioner did not take the stand. He called two character witnesses who testified to his good reputation for honesty and integrity—Justice Edward G. Baker of the New York State Supreme Court, who has known petitioner for more than 40 years (90a), and Edward Daniels, a bank official, who has known petitioner for about 8 years (95a-98a).

The District Court's Charge

In accordance with petitioner's counsel's request (128a-129a), the District Court charged the jury that they were "not permitted under the law to draw any inference of guilt because of the fact that he [petitioner] has failed to testify in his own behalf" (119a-120a). The Court, however, prefaced this portion of the charge with the following statements (119a):

> "I normally do not include this in the charge. I do so only because I have been requested to do so." *

Petitioner's counsel took specific exception to the above quoted prefatory remarks, outside the presence of the jury (124a), and the Court rejected the exception with the remark, "That is correct, because it is reversible error to do that" (124a).

Petitioner's counsel strongly urged the defense in his summation that the alleged cash payments to petitioner were all fictitious and that Novak had actually engaged in a fraudulent tax evasion scheme to siphon off cash from his company for his own personal purposes and to claim the cash withdrawals as tax deductions (99a-102a). The District Court, however, in effect withdrew any such issue from the jury by flatly stating in its charge (115a):

> "This is not an income tax case. Nobody is on trial in this case except Mr. Schabert. The Novak Company is not on trial in connection with income tax * * *."

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* The Court first made the quoted remarks immediately preceding a short paragraph of the charge dealing with character evidence. The Court then made it clear that the quoted remarks applied, not to the charge on character evidence, but to the charge concerning petitioner's failure to take the stand, emphasizing again that "this section, this portion of the charge [dealing with petitioner's failure to take the stand] I give because I have been requested to do so" (119a).

Petitioner's counsel had also requested the Court to charge that, "Testimony with respect to the character and reputation of the defendant may raise a reasonable doubt *where without it none would exist*" (129a). The Court, however, instead charged that the jury should first determine whether petitioner had "established his previous good character", and that if they believed he had, they "should give that fact due weight, and such evidence of good character *when considered with all the other evidence* may create a reasonable doubt" (119a).

While the Court charged that "this being a criminal statute, the receipt and acceptance of money must be done knowingly and wilfully", it gave no definition of the terms "wilfully" and "knowingly", beyond stating that, "If a man were in a drunken stupor and somebody stuck money in his pocket, you would not say that he received it knowingly and wilfully" (114a). The Court followed up the latter illustration by stating that, "The only testimony on this score is the testimony of Novak, who is the man who said, 'I gave him the money. * * *'" (114a-115a).

The Decision of the Court of Appeals

The Court of Appeals acknowledged in its opinion that the trial judge's "gratuitous prefatory remarks" which preceded the instruction with respect to petitioner's failure to take the stand, "were improper and would have been better left unsaid" (App. B., *infra,* p. 9a). The Court held, however, that those remarks could be disregarded as non-prejudicial, stating that, "they were not so distracting as to confuse the jury or reduce the clarity and force of the instruction" concerning petitioner's failure to take the stand (App. B., *infra,* p. 9a).

The Court further held that it was unnecessary for it to consider the questions raised concerning the admissi-

bility under the Business Records Act (28 U. S. C. § 1732) of the entries in the smaller book kept by Miss Farb (Govt.'s Exh. 1, 130a, 131a), which, petitioner contended, were not shown to have been made contemporaneously with, or within a reasonable time after, the making of the payments there reflected, as required by the Act. The Court held that any error on that score could be disregarded as non-prejudicial and as involving "purely cumulative" evidence (App. B., *infra*, pp. 6a-8a).

The Court further declined to review the other questions raised on the ground that no exceptions were taken and that the claimed errors did not amount to "plain error" (App. B., *infra*, pp. 10a, 11a). The Court did, however, acknowledge that the charge with respect to the elements of "wilfully" and "knowingly", "left much to be desired and may not have survived properly taken exceptions" (App. B., *infra*, p. 11a). The Court also misapprehended the effect of the District Court's statements in its charge with respect to the case not being "an income tax case", stating that the District Court's statements were apparently intended to serve as clarification of "the specific charge against the accused" (App. B., *infra*, p. 10a).

Reasons for Granting the Writ

1. As to the District Court's prefatory statement that it did not "normally" charge that no adverse inference could be drawn from a defendant's failure to testify.

A highly important question of general applicability affecting the administration of criminal justice in the Federal courts is here presented, relating to the import and scope of the Congressional mandate that a defendant's failure to take the stand "shall not create any presumption against him" (18 U. S. C. § 3481).

This Court has held that a defendant in a Federal criminal case has an "indefeasible right" to an instruction, at his request, in accordance with the Congressional mandate, that his failure to take the stand "shall not create any presumption against him", and that the Court's refusal of such request is reversible error. *Bruno* v. *United States*, 308 U. S. 287. It has further been observed that "in Federal courts every effort is made to enforce the rule that 'the jury * * * must not permit [a defendant's failure to testify] * * * to weigh in the slightest degree against any such defendant * * *.'" See *Cross* v. *United States*, 335 F. 2d 987, 989, fn. 5 (D. C. Cir.) (per Bazelon, Ch. J.); see also *Stewart* v. *United States*, 366 U. S. 1; *White* v. *United States*, 314 F. 2d 243 (D. C. Cir.).

The trial judge here nevertheless flatly stated that the instruction which this Court held in *Bruno* v. *United States*, *supra*, was a matter of "indefeasible right" to a defendant requesting it, was not "normally" given. The implication from the Court's statement was either that defendants in criminal cases are "normally" not entitled to such an instruction—the interpretation suggested by the Government itself in its brief in the Court of Appeals *—, or that they "normally" take the stand, thus rendering it unnecessary to charge on the subject. In either view, the Court's statement served as a prejudicial reflection on petitioner's failure to testify. *Cf. White* v. *United States*, *supra*, 314 F. 2d at 245-6. Indeed, under the Government's interpretation, the implication conveyed to the jury would be the decidedly prejudicial one that "normally" an adverse inference *may properly be drawn* against a defendant by reason of his failure to take the stand. The necessary

* The Government's brief in the Court of Appeals (pp. 10-11) thus suggested that the jury might have understood the trial judge's remarks to mean that while "'normally' defendants do not rate such a sweeping injunction against inferences", the Court was nevertheless giving such instructions as a sort of favor to this petitioner.

effect of the Court's remarks was, at the very least, to dilute the basic safeguard provided for the protection of a non-testifying defendant, and their prejudicial effect was heightened by the Court's added statement indicating that the instruction was being given, not as a statement of a controlling rule of law, but only because the Court was somehow constrained to do so.

Thus, in construing the New York statute (N. Y. Code Crim. Pro. § 393) which, like the pertinent Federal statute (18 U. S. C. § 3481), mandates against the drawing of any presumption by reason of a defendant's failure to testify, the New York Court of Appeals has held that it is reversible error for a trial judge to weaken the force of the statutory mandate by qualifying words. *People* v. *Fitzgerald*, 156 N. Y. 253, 266; *People* v. *Manning*, 278 N. Y. 40, 44; *People* v. *McLucas*, 15 N. Y. 2d 167, 171. In *People* v. *Fitzgerald*, *supra*, the Court stated (156 N. Y. at 266):

> "* * * In the trial of a criminal case it can never be necessary to add anything to the plain and simple language of the statute on this subject. The fact that the accused does not testify in his own behalf cannot be permitted to create any presumption against him. That is the plain mandate of the law, and the force of the proposition should not be weakened and destroyed with the jury by qualifying words." * * *

The trial judge sought to justify his remarks on the asserted ground that it would be error to give any such instruction in the absence of the defendant's request therefor (124a). As the Court of Appeals itself here pointed out, however (App. B., *infra*, pp. 8a-9a), that Court had previously squarely held that it is *not* error for the trial judge so to instruct the jury even in the absence of any request therefor. *United States* v. *Garguilo*, 310 F. 2d 249, 252 (2d Cir.); *United States* v. *Woodmansee*, 354 F. 2d 235, 236 (2d Cir.).

The Court of Appeals indeed acknowledged that the trial judge's "gratuitous prefatory remarks were improper and would have been better left unsaid" (see App. B, *infra*, p. 9a). Its holding, however, that those remarks could be disregarded as non-prejudicial is at variance with the standards laid down by this Court for determining the applicability of the "harmless error" rule, particularly in the special area here involved.

In *Kotteakos* v. *United States*, 328 U. S. 750, 764-5, this Court, with specific reference to *Bruno* v. *United States*, *supra*, indicated that cases arising under the Congressional mandate here involved provide a special situation as respects the application of the "harmless error" rule. In *Bruno*, this Court emphasized that "the right of an accused to insist on . . . [the] privilege which Congress has given him" under 18 U. S. C. § 3481, was far too important to permit a denial thereof to be dismissed as "harmless error" (308 U. S. at 293-4). Similarly, in *Stewart* v. *United States*, *supra*, 366 U. S. at 9-10, this Court held that a prosecutor's reference to the defendant's failure to take the stand could not be disregarded as "harmless error", so long merely as it was "apparent" that such reference "*could* have affected" the jury's deliberations, and even if there was only the possibility that the jury "*might*" have been influenced thereby. See also *White* v. *United States*, *supra*, 314 F. 2d at 246, to like effect.

Indeed, even in situations other than the special area here involved, this Court has emphasized that error may not be disregarded as "harmless" so long merely as "there is *a reasonable possibility*" that the error "complained of *might have* contributed to the conviction". *See Fahy* v. *Connecticut*, 375 U. S. 85, 86-7; *Stoner* v. *California*, 376 U. S. 483, 490, fn. 8. Certainly, it cannot be maintained that there is not at least a "reasonable possibility" that the trial judge's "gratuitous prefatory remarks" in this case "might have contributed to the conviction".

2. As to the admissibility in evidence under the Business Records Act of entries not shown to have been made substantially contemporaneously with the transactions there reflected.

Important questions of general applicability are here presented concerning (a) the requirement of substantially contemporaneous recording as a condition of admissibility of written entries under the Business Records Act—a matter not yet passed upon by this Court; and (b) the extent to which error in admitting evidence adduced for the purpose of corroborating the disputed testimony of a Government witness may be disregarded as non-prejudicial on the theory that the evidence is "purely cumulative"—a matter involving a conflict among the circuits.

One of the basic conditions of admissibility of a record under the Business Records Act, 28 U. S. C. § 1732, is a showing that "it was the regular course of such business to make such memorandum or record *at the time of such act, transaction, occurrence or event or within a reasonable time thereafter*".

This requirement of a substantially contemporaneous recording of the entries sought to be admitted into evidence, is one of the minimum guarantees of trustworthiness, since "any trustworthy habit of making regular business records will ordinarily involve the making of the record contemporaneously", and the contemporaneous recording is also "necessary in order to assure a fairly accurate recollection of the matter". See 5 *Wigmore on Evidence*, § 1526, p. 375; see also *Missouri Pacific Railroad Company* v. *Austin*, 292 F. 2d 415, 422-3 (5th Cir.); *Barnes* v. *Norfolk Southern Railroad Co.*, 333 F. 2d 192, 197 (4th Cir.); *United States* v. *Indian Trailer Corporation*, 226 F. 2d 595, 600 (7th Cir.).

The requisite showing of a contemporaneous recording of the entries in question, as a regular course of business,

was completely missing in the case of Government's Exhibit 1 (130a, 131a), consisting of the single page from the smaller book kept by Miss Farb in relation to the special cash fund, which was admitted into evidence over petitioner's objection (*supra*, p. 6).

As regards the larger book kept by Miss Farb in relation to the special cash fund, which was admitted into evidence as Government's Exhibit 10, there was testimony by Miss Farb that she made entries in that book on a fairly routine basis, whenever she withdrew monies from the special cash fund at Novak's request, and that she made such entries at or about the times of such withdrawals (45a, 46a). In contrast, there was no such showing with respect to the entries in the smaller book (Govt's Exh. 1).

The crucial entry in the smaller book of the figure of $1,150 under date of April 19, 1960—which was nowhere reflected in the chronologically kept entries in the larger book (Govt's Exh. 10)—was thus in no way shown to have been made by Miss Farb contemporaneously with any withdrawal by her of any money from the special cash fund (see *supra*, pp. 6-7). Indeed, Novak's testimony was that that item represented a total of some five or six payments which he had made to petitioner over a period of time commencing in the spring of 1959; and that he had kept a record himself of such alleged payments on slips of paper which were all compiled at one time and the total thereof entered by Miss Farb "some time *in the latter part of 1960*", and that the individual slips were destroyed (16a, 19a).

Miss Farb herself gave no testimony with respect to the compiling of any such slips, or with respect to the circumstances under which she made the entry in question. In any event, there was no showing that there was any regular routine on Miss Farb's part to make an entry as of a certain date on the basis of slips that Novak might have given her purporting to represent payments

made over a period of about a year prior thereto. The evidence thus establishes an inherent lack of trustworthiness of the entries, which the requirement of contemporaneous recording was designed to insure. *Cf. Hartzog* v. *United States,* 217 F. 2d 706, 710 (4th Cir.); *Gordon* v. *Robinson,* 210 F. 2d 192, 196 (3d Cir.).

As noted above, the Court of Appeals held it unnecessary to reach the questions thus presented, ruling that any error on that score could be disregarded as non-prejudicial and as involving "purely cumulative" evidence (App. B., *infra,* pp. 6a-8a).

The decision below is in direct conflict with the decisions in other circuits, in which it has been squarely held that where evidence is erroneously admitted for the purpose of corroborating the contradicted or impeached testimony of a Government witness, it cannot be assumed that the jury was in no way influenced by such evidence and the error cannot be disregarded as involving merely "cumulative" evidence. *Dowdy* v. *United States,* 46 F. 2d 417, 427 (4th Cir.); *United States* v. *Leggett,* 312 F. 2d 566, 573 (4th Cir.); *United States* v. *Balance,* 59 F. 2d 1040, 1042 (D. C. Cir.); *Brady* v. *United States,* 39 F. 2d 312, 315 (8th Cir.); *Lindsey* v. *United States,* 237 F. 2d 893, 897-8 (9th Cir.); *Yoder* v. *United States,* 71 F. 2d 85, 89 (10th Cir.). Indeed, the Second Circuit had itself taken the same view in an earlier decision by Judge Learned Hand. *United States* v. *Sherman,* 171 F. 2d 619, 622 (2d Cir.).

Thus, in *Dowdy* v. *United States, supra,* the Government had introduced into evidence statements made by a Government witness, one Martin, to an arresting officer, one Trexler, for the purpose of corroborating Martin's disputed testimony. Holding that the admission of such statements was error, and rejecting the contention that the challenged evidence was merely cumulative of Martin's direct testimony on the witness stand and therefore non-prejudicial,

the Fourth Circuit Court of Appeals stated (46 F. 2d at 427):

> "It is true that Martin testified practically to all of these same matters upon the witness stand; and to a discriminating mind, the fact that Martin had made the same statements to Trexler that he made upon the stand might not have added any weight to his testimony. But jurors are not trained in such matters. The testimony was admitted *as corroborating Martin,* and the jury must have received the impression that it had that effect. We are of opinion therefore that the admission of this testimony was prejudicial error, and the new judgment against Funk must be reversed and a new trial granted him, but on that ground alone." (Emphasis in original.)

In the present case, Novak's testimony with respect to the alleged cash payments aggregating $1,150—which he testified were in each instance made with cash sums which his bookkeeper, Miss Farb, gave him in an envelope out of the secret cash fund (18a, 15a, 17a)—was directly impeached (a) by the undisputed showing that there were no entries at all in the larger chronologically kept book (Govt's Exh. 10) reflecting any such payments to petitioner, and (b) by Miss Farb's testimony that she would make an entry in that chronologically kept book every time she was called upon to draw on the secret cash fund and to put money in an envelope at Novak's request for a particular individual, and that she could find no entries in that book reflecting the alleged payments to petitioner aggregating $1,150 (see *supra,* pp. 5-6). The absence of such entries indeed serve to cast great doubt on the veracity of Novak's entire testimony.

The challenged exhibit, consisting of the page from the smaller book (Govt's Exh. 1), was obviously offered for the very purpose of providing *documentary corroboration* of Novak's testimony with regard to the alleged payments totalling $1,150, and thereby overcoming the impeaching

force of the absence of any entries reflecting such payments in the larger chronologically kept book. The prosecutor laid great stress in his summation on the entries in the particular exhibit here under challenge (105a-106a). It is further significant that the jury interrupted its deliberations to call for both of the Government exhibits (124a-127a), and they might well have been substantially influenced by the entries in the smaller book in returning a verdict of guilty on all three counts.

The analysis of the Court below, in support of its decision, that the jury could not reasonably have disbelieved Novak's testimony even if the challenged exhibit had been excluded from evidence (App. B, *infra*, pp. 6a-8a), is premised on a disregard of the impeaching force of the other evidence hereinbefore mentioned, and on the erroneous assumption that such other evidence could not rationally have influenced the jury's appraisal of the credibility of Novak's testimony.

The cases cited by the Court below in support of its decision (App. B, *infra*, p. 8a) are not in point, since none of them involved a situation, as here, where the evidence sought to be discounted as "cumulative" was used for the very purpose of overcoming the impeaching force of other evidence.

3. As to the Court's charge on the evidence of good character.

The question here presented concerns the weight properly to be accorded to evidence of the defendant's good character in a Federal criminal case. The District Court in this case refused petitioner's request for a charge that such evidence may raise a reasonable doubt *"where without it none would exist"* (129a), and in charging instead that such evidence may create a reasonable doubt *"when considered with all the other evidence"* (119a).

That was a departure from the rule as set forth by this Court that "such testimony [of the defendant's good character] *alone* in some circumstances, may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so instructed." See *Michelson* v. *United States*, 335 U. S. 469, 476, citing *Edgington* v. *United States*, 164 U. S. 361. There have been conflicting decisions on this subject in the Second Circuit. *Cf. United States* v. *Lowenthal*, 224 F. 2d 248, 249 (2d Cir.), with *United States* v. *Minieri*, 303 F. 2d 550, 555 (2d Cir.), cert. den. 371 U. S. 847.

The Court below declined to reach this question because petitioner's counsel had failed to take any exception at the trial (App. B, *infra*, p. 10a). The primary purpose, however, of the requirement for exceptions is to give the trial court an opportunity to correct possible error (*United States* v. *Currens*, 290 F. 2d 751, 759 [3d Cir.]), and that purpose was here fully served by petitioner's counsel's specific request for an instruction permitting the jury to find a reasonable doubt on the basis of evidence of good character alone. See *Bird City Equity Mercantile Exchange* v. *United States*, 338 F. 2d 790, 792 (10th Cir.); *Golden* v. *United States*, 318 F. 2d 357, 360 (1st Cir.). No purpose could be served by any further action on petitioner's part by way of exception, since the trial court was necessarily sufficiently aware of petitioner's position. *Cf. United States* v. *Kelinson*, 205 F. 2d 600, 601-2 (2d Cir.); *United States* v. *Currens*, *supra*, 290 F. 2d at 759; *Golden* v. *United States*, *supra*, 318 F. 2d at 360. In such circumstances, the reliance of the Court below on the absence of a technical exception amounted to the subordination of substance to mere form.

4. As to the Court's charge concerning the elements of "wilfully" and "knowingly".

The question here presented, relating to the element of "wilfullness" which Congress explicitly made an essential

element of the crime here involved (29 U. S. C. § 186[d]), is one which has not previously been passed upon by this Court. No issue with regard to that element was before this Court in *United States* v. *Ryan,* 350 U. S. 299, even though the Court did there state, in reference to an entirely different question concerning the scope of the statute, that the statute "appears to be a criminal provision, *malum prohibitum*" (at p. 305).

The trial court in this case nowhere in its charge gave any definition of the terms "wilfully" and "knowingly" beyond stating that "If a man were in a drunken stupor and somebody stuck money in his pocket, you would not say that he received it knowingly and wilfully". (114a). Further, by coupling the discussion of wilfullness and the reference to a case of "drunken stupor" with the statement that "The only testimony on this score is the testimony of Novak, who is the man who said" that he gave the monies to petitioner (114a-115a), the trial court conveyed the impression to the jury that so long as they found that petitioner had received and accepted money from Novak, it would necessarily follow that he had done so "wilfully".

Indeed, the effect of the suggestion that it would require a showing of an extreme situation such as a "drunken stupor" for petitioner to prevail on the issue of willfullness was improperly to take that issue from the jury and to decide it against petitioner as a matter of law. This Court has thus held that it is error for the trial court to instruct the jury that a particular fact which is an essential element of the crime has been established as a matter of law, even though the evidence relating thereto is uncontroverted and may even be "conclusive". *United Brotherhood of Carpenters and Joiners of America* v. *United States,* 330 U. S. 395, 408; see also *Schwachter* v. *United States,* 237 F. 2d 640, 644 (6th Cir.); *Roe* v. *United States,* 287 F. 2d 435, 440 (5th Cir.), cert. den. 368 U. S. 824.

While acknowledging that "the charge in many respects left much to be desired and may not have survived properly

taken exceptions", the Court below nevertheless declined to review because of the absence of an exception, and held that the situation was not one involving "plain error" (App. B, *infra*, p. 11a). It is, however, well settled that it is "plain error", requiring reversal even if the point was not raised below, for the trial court to fail "to submit to the jury the essential ingredients of the . . . offense" (*Screws* v. *United States*, 325 U. S. 91, 107), or to give an insufficient or misleading instruction as to an essential element of the crime (*Danielson* v. *United States*, 321 F. 2d 441, 445, fn. 9 [9th Cir.]).

5. As to the Court's charge that "This is not an income tax case" and that the employer company was "not on trial in connection with income tax".

The question here presented is whether it is "plain error" for the trial court in a Federal criminal case to so charge the jury as to withdraw from their consideration a substantial defense urged by the defendant.

As shown above, petitioner's counsel in his summation strongly urged the defense that Novak had not made any of the alleged cash payments to petitioner but instead had actually engaged in a fraudulent tax evasion scheme to siphon off cash from his company for his own personal purposes and to claim the cash withdrawals as tax deductions (99a-102a).

By charging the jury that "This is not an income tax case" and that "The Novak Company is not on trial in connection with income tax" (115a), the trial court could reasonably be regarded by the jury as in effect advising them that they were precluded from giving consideration to the inferences urged by petitioner's counsel. The effect of the instructions was thus to take any issue of fact on that score away from the jury, and substantially to undercut petitioner's defense.

The Court below disposed of petitioner's contentions in this regard on the theory that the trial judge's statements were intended to serve as clarification of "the specific charge against the accused", notwithstanding that such statements could in no way conceivably serve that purpose. The Court thus stated (App. B, *infra*, p. 10a):

> "The trial judge obviously felt that there may have been some confusion in the minds of the jury *as to the specific charge against the accused* and said in the course of his instructions, 'This is not an income tax case'. No exception was taken to this statement at the trial and it did not constitute plain error."

The Court seemed to have had in mind the possibility that the jury might have been considering *petitioner's* potential guilt of the crime of income tax evasion by not reporting the alleged cash payments in *his* income tax return. There was, however, no such issue even suggested in the case. The only issue raised with respect to possible income tax evasion related exclusively to the income tax return of the *Novak Company*. The Court below thus apparently overlooked the significant circumstance that the trial judge did not confine his remarks to the observation that "This is not an income tax case"—the only remark quoted in its opinion. The trial judge thus went further and stated that "Nobody is on trial in this case except Mr. Schabert", and that "The Novak Company is not on trial in connection with income tax" (115a). The jury must have understood that these remarks were directly aimed at petitioner's aforementioned defense.

Contrary to the view expressed by the Court below, it has been squarely held that "plain error" is committed where the Court's charge has the effect of taking an issue of fact away from the jury. *United States* v. *Raub*, 177 F. 2d 312, 315-16 (7th Cir.); see also *United States* v. *Haynes*,

291 F. 2d 166, 167 (2d Cir.). Even the Second Circuit has held that it will notice as "plain error" prejudicial statements by the Court which have the effect of undercutting the defendant's defense, where "an exception could not have led to an additional, curative instruction". *United States* v. *Woods*, 252 F. 2d 334, 336 (2d Cir.); *United States* v. *Salazar*, 293 F. 2d 442, 444 (2d Cir.). These decisions are squarely applicable to this case.

CONCLUSION

For all of the reasons advanced, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Statutes and Rule Involved

29 U. S. C. § 186

§ 186. Restrictions on payments and loans to employee representatives, labor organizations, officers and employees of labor organizations, and to employees or groups or committees of employees; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; * * *

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

* * *

(d) Any person who wilfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $1,000 or to imprisonment for not more than one year, or both.

18 U. S. C. § 3481

§ 3481. Competency of accused

In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, Dis-

trict, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

28 U. S. C. § 1732

§ 1732. Record made in regular course of business; photographic copies

(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

* * * *

Federal Rules of Criminal Procedure

Rule 52. Harmless Error and Plain Error

* * *

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

APPENDIX B

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 385—September Term, 1965.

(Argued May 10, 1966 Decided June 14, 1966.)

Docket No. 30279

THE UNITED STATES OF AMERICA

Appellee,

v.

BENJAMIN A. SCHABERT,

Defendant-Appellant.

Before:

WATERMAN, KAUFMAN and ANDERSON,

Circuit Judges.

Appeal from judgment of conviction on three counts of an indictment charging the defendant with violations of Title 29 U. S. C. § 186(b), in the United States District Court for the Eastern District of New York before Joseph C. Zavatt, *Chief Judge,* and a jury. Affirmed.

Appendix B

ANDERSON, *Circuit Judge*:

During the period covered by the facts of this case, the defendant-appellant, Benjamin A. Schabert, was the financial and business agent of Plumbers Local Union 371, a labor organization affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada. Several members of this local union were among the eighteen to twenty employees of Novak & Co., Inc., a plumbing firm, which in late 1958, had been awarded a contract to do the plumbing work in the construction of a New York City housing project on Staten Island, known as the Stapleton project. On August 29, 1963, Schabert was indicted on three counts for violations of Title 29 U. S. C. § 186(b)[1] (unlawful receipt of money by a labor official from an employer). The first count charged him with having received from Novak & Co., Inc., approximately $1,150 on or about April 19, 1960; the second count charged him with having received from the same company approximately $250 on or about July 19, 1960; and the third count alleged the receipt from Novak & Co., Inc., of $300 on or about January 28, 1961.

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[1] 29 U. S. C. § 186 provides:

"(a) It shall be unlawful for any employer . . . to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce;

* * *

"(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of money or other thing of value prohibited by subsection (a) of this section."

Appendix B

The evidence showed that, shortly after the work commenced in the spring of 1959, Schabert met with Leon Novak, president and principal shareholder of the plumbing concern, at a restaurant next door to the offices of the union and discussed the project. As the result of their talk, Schabert agreed to see to it that the Novak Company got the best men the Union could furnish in return for which the Company agreed to pay Schabert $5 an apartment.

Novak testified that six or eight weeks after the meeting at the restaurant he met Schabert and paid him a sum of money in cash. Thereafter, on several other occasions, Novak paid Schabert additional sums in cash, all of which added up to the $1,150 alleged in the first count. Novak could not recall the specific sums paid on each separate occasion; but he testified that he wrote the amount of each of these payments on a separate slip of paper and then turned over an accumulation of these slips to his bookkeeper, Frieda Farb, who, in the latter part of 1960, entered the total of $1,150, with the date April 4, 1960, in a small ledger book, the pertinent page of which, entitled "B. Schabert," became a Government exhibit in the case.[2] After the entry had been made, the slips were destroyed. Novak specifically remembered the occasions when the cash payments were made by him to Schabert as alleged in the second and third counts, as well as the amount paid in each instance. The dates and amounts of these payments were also entered by the bookkeeper on the same page of the small ledger.

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[2] There was written at the top of this exhibit:

"Staple—693 apts @ 5 = 3465 B. Schabert." Beneath this heading were the following entries:

"4/19/60	1150
7/19/60	250
1/28/61	300"

Appendix B

The bookkeeper testified that all of the payments came out of a special fund which had been built up by padding the payroll. Withdrawals from the fund were regularly entered in a cash disbursements journal in chronological order. This larger book was also a Government exhibit. While the payments of $250 and $300 were reflected in the expenditures listed in the journal, there were no corresponding disbursements shown for the amounts totalling $1,150.

The only evidence offered by the defense was the testimony of two witnesses who testified to Schabert's good reputation for honesty and integrity. The jury found the defendant guilty on all three of the counts. He was sentenced to three months imprisonment and fined $5,000 on the first count; the sentences on the second and third counts were suspended and he was placed on probation for two years. We affirm.

The appellant claims that the trial court erred in admitting into evidence, under the Federal Business Records Act,[3] a photostatic copy of the page from the small book or ledger which showed the payments made to Schabert. It is asserted that it was not kept in the regular course of business because the entry was not made contemporaneously with, or within a reasonable time after, the making of the payments, because the ledger entry of $1,150 for April 19, 1960 was not supported by corresponding journal entries, and because there was insufficient evidence to support the authentication of the ledger book. It is not, however, necessary to discuss the questions raised concerning the admissibility of the ledger under the Business Records Act because, as evidence, it was purely cumulative. Before the ledger was admitted into evidence, Novak had testified without objection that, between the spring of 1959 and a time

[3] 28 U. S. C. § 1732.

prior to July 19, 1960, he had made five or six payments to Schabert which had totalled $1,150.[4] It cannot be forcefully contended that the jury may have disbelieved this testimony but did believe the ledger entry, because all of

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[4] Novak's testimony on direct examination was in pertinent part as follows:

"Q. Do you remember any occasion when you gave Mr. Schabert a specific amount of money? A. Yes. On July 19, 1960, I gave him $250.

"Q. Where was that? A. At the Candlelight.

"Q. Was anyone else present at that time? A. No, sir.

"Q. Did you have any conversation with Mr. Schabert about it? A. No, just generalities.

"Q. How about any time after that ? A. No. On January 28, 1961, $300.

"Q. How much? A. $300.

"Q. And what was the date? A. January 28, 1961.

"Q. Was anyone present on that occasion? A. Just the two of us.

"The Court: And at what place was?

"The Witness: At the Candlelight.

"Q. So that all your meetings with him when you gave him money were at the Candlelight Restaurant; is that correct? A. To the best of my recollection, yes.

"Q. So that on two occasions you recall that you gave him $250 and $300? A. Yes, sir.

"Q. How about prior to that? A. Well, prior to that, as an accumulation or a total of some six, five or six meetings, I had given him a total of $1150.

"Q. You gave him a total of $1150? A. That is right, sir.

"Q. On how many occasions? A. I would say five or six occasions.

"Q. Do you know when the first occasion was? A. Well, the first occasion, I believe, was about the second time I met him at the site.

"Q. And when would that be? A. That would be in the spring of 1959.

"Q. And the payments continued until January of 1961? A. That is correct, sir.

"Q. And how much did you give him all together? A. $1700."

the testimony on the subject makes it perfectly clear that Novak was the only one who had firsthand knowledge of the payments to Schabert and, as such, reported them to the bookkeeper, who, under his direction, made the entry in the ledger. Briefly, therefore, the jury reasonably could not have believed Novak's testimony in one instance and not in the other. Since the crucial evidence was already in, the reception of the ledger as an exhibit did nothing more than recount the same information from the same source and in no wise prejudiced the appellant. *Doss* v. *United States,* 355 F. 2d 663, 666 (8 Cir. 1966); *Gajeweski, et al,* v. *United States,* 321 F. 2d 261, 267 (8 Cir. 1963), cert. denied 375 U. S. 968 (1964); *United States* v. *Quong,* 303 F. 2d 499, 504 (6 Cir. 1962), cert. denied 371 U. S. 863 (1962); *United States* v. *Perez,* 242 F. 2d 867, 870 (2 Cir. 1957), cert. denied 354 U. S. 941 (1957).

The appellant claims several errors relating to the court's charge to the jury. At the trial his counsel had requested a specific instruction concerning the defendant's failure to testify. The court had decided to grant the request and, with this in mind at a particular point in the charge said, "I normally do not include this in the charge. I do so only because I have been requested to do so." Then instead of giving the instruction requested, as he intended to do, the judge advised the jury about the weight or value to be accorded to evidence of the good reputation of the accused for honesty and integrity. Realizing his mistake, he then said, "Oh, no, I beg your pardon; that is not the portion that I would not have given. I would have given this portion of the charge. But this section, this portion of the charge I give because I have been requested to do so."

The trial judge apparently was laboring under the misapprehension that it is error to instruct that no adverse inferences could be drawn from a defendant's failure to testify in the absence of a request for such a charge. Although this court has said that it is the better practice

not to charge on this subject, it is not reversible error to do so. *United States* v. *Woodmansee,* 354 F. 2d 235, 236 (2 Cir. 1965). Moreover, it is entirely proper and even necessary to give such a charge if it is requested by a non-testifying defendant. *United States* v. *Woodmansee, supra.* Despite the fact that the gratuitous prefatory remarks were improper and would have been better left unsaid, they were not so distracting as to confuse the jury or reduce the clarity and force of the instruction that no inferences were to be drawn against the defendant because he did not take the witness stand, nor did they otherwise prejudice the accused.

The appellant also complains of that part of the charge which dealt with evidence of the defendant's good reputation for honesty and integrity. The instruction given on the weight or value to be accorded such evidence was in accord with our earlier decisions in *United States* v. *Minieri,* 303 F. 2d 550, 555 (2 Cir. 1962) and *United States* v. *Lowenthal,* 224 F. 2d 248, 249 (2 Cir. 1955) and was correct. Equally without merit is the contention that the trial judge erred in refusing to charge the jury that it is also a violation of Title 29 U. S. C. § 186 for an employer to make payments to a union official. This was sought to buttress the attack on Novak's credibility made by the defense on cross-examination. There was ample evidence before the jury of Novak's part in the payment of money to Schabert, and the court's charge on credibility was adequate. Its refusal to accede to defense counsel's request specifically to inject into its instructions a discussion of Novak's guilt under Title 29 U. S. C. § 186 was, under the circumstances, proper and not an abuse of discretion.

Another point raised on this appeal concerns the trial judge's own inquiries of the witness Novak, following an objection made by defense counsel to the Government's questions designed to imply that Schabert could create delays and otherwise make difficulties for Novak and his com-

pany because under the contract between the Plumbing Contractors' Association and the Union, the Union had the right to inspect Novak & Co.'s work to insure compliance with the applicable codes. The trial judge made a few brief inquiries to determine the relevancy of the contract clause in question and sustained defense counsel's objection. Appellant now argues that the judge's questions were so prejudicial that they constituted reversible error. There is, however, no validity to this claim. No objection was made to any of the court's questions, and the witness' answers, to the effect that the Union had no right under the contract to impede work on the project in this fashion, tended to remove rather than create any prejudice to the accused.

The appellant seeks reversal or a new trial under Rule 52(b), F. R. Crim. P., on several other grounds of plain error. None has merit. On his cross-examination of Novak and the bookkeeper and in his argument, defense counsel sought to show that the cash payments to the appellant were fictitious and that the padding of the payroll and the special fund created from that source were an income tax evasion device. The trial judge obviously felt that there may have been some confusion in the minds of the jury as to the specific charge against the accused and said in the course of his instructions, "This is not an income tax case." No exception was taken to this statement at the trial and it does not constitute plain error. The trial court also refused to charge, as the defendant requested, that evidence of good reputation for honesty and integrity may raise a reasonable doubt "where without it none would exist," instead of which the court said, "when considered with all other evidence." No exception was taken to the refusal to charge as requested, or to the charge as made, and the claim cannot be presented for the first time on appeal because it does not amount to plain error.

Appellant also complains that the trial court failed to instruct on the element of intent, gave inadequate defini-

tions of the words "wilfully" and "knowingly" and did not sufficiently discuss the elements of the offense. While it is true that the charge in many respects left much to be desired and may not have survived properly taken exceptions,[5] nevertheless, we are not of the opinion that the shortcomings are such as to work an obvious unfairness to the accused or perpetrate a miscarriage of justice. The appellant relies heavily upon the case of *United States* v. *Byrd*, 352 F. 2d 570 (2 Cir. 1965) in which a conviction was reversed because the trial court's charge improperly dealt with criminal intent as an essential element of the offense. In that case, as in the present one, we indicated that enough of a definition of ordinary criminal intent could be winnowed out of what the court said about the word "knowingly," to survive the claim of plain error. But the *Byrd* case is distinguishable from the present case in that the trial court in *Byrd*, in effect, removed the element of intent from the case by reciting, toward the end of the charge, four essential elements which the court said constituted the offense, but it failed to include in the four described, the element of criminal intent. The court then instructed the jury that if they found the four elements which the court mentioned proven beyond a reasonable doubt, they had a duty

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[5] The pertinent portion of the charge is the following:

"You have got to decide whether in fact Novak gave money to Schabert. It makes no difference here whether it would be a loan; it is a crime to receive or accept any money.

"Now, of course, this being a criminal statute, the receipt and acceptance of money must be done knowingly and wilfully. If a man were in a drunken stupor and somebody stuck money in his pocket, you would not say that he received it knowingly and wilfully. The only testimony on this score is the testimony of Novak, who is the man who said, 'I gave him the money. I gave him a specific amount of money. On January 28, 1961, I gave him a specific amount of money. On July 19, 1960, and prior to that on this job, I gave him'—I think he said—'eleven hundred dollars.'"

to convict. This is what made the defect plain error in that case because the jury was instructed to find the defendant guilty solely on a finding of four elements which did not include criminal intent. That is not the case here. While the definitions of the words "knowingly" and "wilfully" were not as full and enlightening as those usually given, no exception was taken at the time, and sufficient was said to advise the jury that it had to find that the acceptance of money was done wilfully and knowingly and that mere acceptance was not enough.

We have examined the portion of the material withheld from the appellant, which had been produced by the Government in response to appellant's motion under the Jencks Act, Title 18 U. S. C. § 3500, and conclude that the trial court did not err in not directing the Government to make such portions available for inspection by appellant's counsel.

The judgment of the district court is affirmed.

Appendix B

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of June, one thousand nine hundred and sixty-six.

Present:

HON. STERRY R. WATERMAN,
HON. IRVING R. KAUFMAN,
HON. ROBERT P. ANDERSON,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BENJAMIN A. SCHABERT,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

Appendix B

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York on the twentieth day of July, one thousand nine hundred and sixty-six.

Present:

HON. STERRY R. WATERMAN,
HON. IRVING R. KAUFMAN,
HON. ROBERT P. ANDERSON,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BENJAMIN A. SCHABERT,
Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

ORDERED that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk

By VINCENT A. CARLIN,
Chief Deputy Clerk.

Appendix B

Order Denying Petition for Rehearing in Banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentieth day of July, one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD, *Chief Judge,*
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. ROBERT P. ANDERSON,
HON. WILFRED FEINBERG,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BENJAMIN A. SCHABERT,
Defendant-Appellant.

A petition for a rehearing in banc having been filed herein by counsel for the appellant.

Upon consideration thereof, it is

ORDERED that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk.

By VINCENT A. CARLIN,
Chief Deputy Clerk.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 443

BENJAMIN A. SCHABERT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

The opinion of the court of appeals (Pet. App. 3a-12a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1966. A petition for a rehearing was denied on July 20, 1964. The petition for a writ of certiorari was filed on August 13, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances, the trial court erred in admitting a business record into evidence.

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2. Whether there was error in the instructions to the jury.

STATUTE INVOLVED

28 U.S.C. 1732(a) provides as follows:

> In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.
>
> The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

STATEMENT

Petitioner was indicted in the United States District Court for the Eastern District of New York in three counts,[1] which charged that he, as a labor union officer, received various sums of money from an em-

[1] Count 1 charged the receipt of approximately $1,150 on or about April 19, 1960; count 2, the receipt of approximately $250 on or about July 19, 1960; and count 3, the receipt of approximately $300 on or about January 28, 1961.

ployer, in violation of Section 302(b)(1) and (d) of the Labor Management Relations Act, 29 U.S.C. 186 (b)(1) and (d). (R. 4a–5a.)[2] After a jury trial, he was convicted on all three counts (R. 127a) and sentenced to imprisonment for three months and fined $5,000 on count 1. Sentence was suspended on counts 2 and 3 and petitioner was placed on probation for a period of two years (R. 134a–135a). The court of appeals affirmed the conviction.

At all relevant times, petitioner was the business agent for a plumbers' local whose members were employed in the construction of an apartment house complex on Staten Island, New York, known as "Stapleton Houses." Leon Novak, president of "Novak and Company," which was building the apartments, met with petitioner in the spring of 1959, shortly after the work had begun. Petitioner told Novak that he would get the best men available and that they would do a good job, in exchange for which Novak promised to pay petitioner a sum amounting to five dollars for each of the 690 units in the complex (R. 8a–11a). Novak testified that he made various cash payments to petitioner totaling the $1,150 alleged in count 1, although he could not recall the specific amount of each payment (R. 15a–16a). He further testified to particular payments of $250 on July 19, 1960, and $300 on January 28, 1961. The construction did not proceed as anticipated, and Novak gave petitioner only $1,700 (R. 15a–16a) of

[2] The figures in parentheses refer to the pages of petitioner's printed Appendix in the court of appeals.

the approximately $3,400 that would have been due him under the illicit agreement (R. 19a–20a).

Novak's bookkeeper testified that when she made a withdrawal from a secret cash fund and gave the money to Novak in an envelope, she would make an entry in a special book (Gov't Ex. 10, R. 132a–133a), which was admitted without objection (R. 47a). If Novak mentioned a name, it would be reflected in the entry. Petitioner's name appeared with respect to entries on July 19, 1960 and January 28, 1961 (R. 45a–51a). The book did not reflect the previous payments amounting to $1,150 as charged in count 1 of the indictment and as testified to by Novak.

A page of another, smaller book kept by the bookkeeper as a record of job expense payments was admitted into evidence (R. 52a–54a), over objection.[3] This page contained the heading: "Staple.—693 apts @ 5=3465—B. Schabert" and entries, "4/19/60, 1150; 7/19/60, 250; 1/28/61, 300" (Gov't Ex. 1, R. 130a). Novak testified that, when he made a payment to petitioner, he would get the money from his bookkeeper and keep a record on slips of paper. He said the slips were compiled at one time as a total result by the bookkeeper, (he thought some time in the latter part of 1960), put into the book, and the slips destroyed (R. 17a–19a). The bookkeeper testified with regard to the small book that she would make entries when she received instructions from Novak to do something and that she would make such

[3] The basis for the objection was that the small book "was not a book kept in the regular course of business" (R. 55a and 55a), that it had "nothing to do with business" (R. 35a).

entries either at the time Novak gave her such instructions or a day or two later, but within a day or two of the date that appeared thereon (R. 31a, 33a, 52a). Neither the government nor the defense asked the bookkeeper whether or not she had compiled slips totalling $1,150 as shown by the entry for April.

ARGUMENT

1. There was no error in the admission of government's Exhibit 1. The only objection to this exhibit at trial was that it was not kept in the regular course of business, that it had nothing to do with the business (*supra,* note 3), apparently referring to the illegality of the payments recorded (R. 35a–39a). This objection was wholly without merit, as the legitimacy of the transactions shown has nothing to do with the regularity of their entry in the course of business. *United States* v. *Re,* 336 F. 2d 306 (C.A. 2), certiorari denied, 379 U.S. 904; *United States* v. *Quick,* 128 F. 2d 832, 837 (C.A. 3).

In the court of appeals, and in this Court, petitioner has argued that Exhibit 1 should not have been admitted under 28 U.S.C. 1732(a) because the entries were not contemporaneously made. Novak testified that he believed the slips (relating to the payments) had been presented to his bookkeeper in the latter part of 1960, whereas the bookkeeper testified that the entries were made within a day or two of the date shown. In any event, as the court below held, inasmuch as proof of the fact that payments amounting to $1,150 were made depended entirely on the testimony of Novak, little if any weight was gained by the

entry's being admitted in evidence.[4] The exact amount of the payments made was immaterial. And, since the payments in July 1960 and January 1961 were reflected in the other book (admitted without objection) Exhibit 1 was superfluous as to them. The court of appeals correctly ruled that, in view of the purely cumulative nature of this evidence, it was unnecessary to determine its strict admissibility under the Business Records Act. *Doss* v. *United States*, 355 F. 2d 663, 666 (C.A. 8); *United States* v. *Quong*, 303 F. 2d 499, 504 (C.A. 6), certiorari denied, 371 U.S. 863; cf. *Gajewski* v. *United States*, 321 F. 2d 261, 267 (C.A. 8), certiorari denied, 375 U.S. 968.[5]

2. None of the various issues raised concerning the charge to the jury warrant further review in this Court.

a. The court prefaced an unexceptionable instruction that no inference of guilt was to be drawn from petitioner's failure to testify with the following remark:

> I normally do not include this in the charge. I do so only because I have been requested to do so. [R. 119a.]

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[4] The entry was not independent corroboration of Novak's testimony; it, too, depended on his credibility since the bookkeeper made entries as ordered by Novak, and had no personal knowledge of payments to petitioner.

[5] Quite apart from the Act, the disputed page would have been usable at trial under common law principles to refresh Novak's recollection (see R. 12a), since both Novak, who made the payments and prepared the information to be recorded, and the bookkeeper, who made the entries, testified with respect thereto. See 3 Wigmore, *Evidence* §§ 750–55 (3d ed. 1940).

The basis for the court's preliminary explanation was apparently the holding that the instruction should not be given in the absence of a request therefor. *United States* v. *Woodmansee,* 354 F. 2d 235, 236 (C.A. 2). As the court of appeals observed, although the remark "would have been better left unsaid," the instruction which followed it was clear, and nothing prejudicial to petitioner could be inferred from it.

b. Petitioner requested the following instruction:

> Testimony with respect to the character and reputation of the defendant may raise a reasonable doubt where without it none would exist. [R. 129a.]

In lieu thereof the court instructed:

> Testimony has been given in this case concerning the good character of the defendant. If you believe that the defendant has established his previous good character, there [sic] you weigh the testimony of the witnesses to determine whether you do find that or not. If you do believe that he has established his previous good character, then you should give that fact due weight, and such evidence of good character when considered with all the other evidence may create a reasonable doubt. I said "may create a reasonable doubt." [R. 119a.]

It is true that evidence of good reputation has a tendency to engender reasonable doubt of guilt. That is the basis of its admissibility. However, such evidence should be considered together with all the other evidence adduced. *Michelson* v. *United States,* 335 U.S. 469, 476; *Edgington* v. *United States,* 164 U.S. 361, 366. The instruction offered was too broad and

the instruction given was proper. *United States* v. *Lowenthal*, 224 F. 2d 248, 249 (C.A. 2).

c. The court instructed that the indictment charged, in each of its three counts, that "defendant wilfully and knowingly received and accepted" various amounts of money from Novak (R. 112a). It also instructed:

> Now, of course, this being a criminal statute, the receipt and acceptance of money must be done knowingly and wilfully. If a man were in a drunken stupor and somebody stuck money in his pocket, you would not say that he received it knowingly and wilfully. [R. 114a.]

While distinctions are sometimes drawn between the words "knowingly" and "willfully," the applicable statute, 29 U.S.C. 186(d), uses only the term "willfully," so that any such distinctions were irrelevant. The jury could scarcely have been misled as to the nature of the offense charged or in any way confused by the illustration which the court offered. There was no exception to the instruction or request for further clarification.

d. On summation it was argued on behalf of petitioner (R. 100a, 101a): "The one that was really clipped here, as I see it, is Uncle Sam, the United States of America. * * * Now, this is a tax-deductible item, Mr. Novak. Did you take it off your income tax?" The court instructed without objection or exception:

> This is not an income tax case. Nobody is on trial in this case except Mr. Schabert. The

> Novak Company is not on trial in connection with income tax. * * * [R. 115a.]

The court then explained that the critical issue was whether petitioner knowingly and wilfully received money from the company which employed members of his labor organization. The court did not thereby take an issue of fact away from the jury; it merely directed the jury's attention from a false to the real issue in the case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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